SUPREME COURT, U. S.

Supreme Court,
FILE
JUN 5
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1743

WILLIAM GOLDMAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

On Writ of Certiorari to the Court of Appeals of the State of New York

RICHARD H. KUH
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

LEWIS R. FRIEDMAN
JONATHAN LOVETT
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Jurisdiction	2
Statement of the Case	2
Argument	
Petitioner's meritless claims were properly rejected by the New York State Court of Appeals and do not raise substantial questions worthy of review by this Court	6
Conclusion	8

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1743

WILLIAM GOLDMAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

On Writ of Certiorari to the Court of Appeals of the State of New York

Preliminary Statement

Petitioner William Goldman seeks a Writ of Certiorari to review a judgment of the Court of Appeals of the State of New York, rendered February 21, 1974, unanimously affirming without opinion, a judgment of the Appellate Division, First Judicial Department, rendered October 16, 1973, which unanimously affirmed without opinion a judgment of the New York State Supreme Court, New York County, rendered March 9, 1973, convicting petitioner, upon his

plea of guilty, of GRAND LARCENY IN THE SECOND DEGREE [New York Penal Law §155.35], and sentencing him to an indeterminate, four-year term of imprisonment. A stay in execution of petitioner's sentence had been granted by Mr. Justice MARSHALL but was revoked by him on May 20, 1974. Thereafter, on May 28, 1974, a second application for a stay in execution of sentence was denied by Mr. Justice MARSHALL.

Jurisdiction

The jurisdiction of this Court is predicated upon 28 U.S.C. §1257(3).

Statement of the Case

By a one hundred and twenty-four count indictment filed on April 28, 1972, petitioner was charged with the crimes of grand larceny in the second degree and offering a false instrument for filing in the first degree. In substance, the indictment alleged that Goldman, a dentist, stole $278,-651.40 from the Department of Social Services and the City of New York by filing fraudulent medicaid dental claims. On May 5, 1972, petitioner pleaded not guilty. Subsequently, during plea negotiations, the prosecutor advised Goldman's then attorney, former New York City Criminal Court Judge William Ringel, that the People intended to recommend a sentence of imprisonment regardless of any offer of restitution by the defendant (A 20).*

Five months later, on October 19, 1972, petitioner, through counsel, offered to plead guilty to one count of grand larceny in the second degree in satisfaction of all

* Numerical references preceded by the letter "A" refer to the pages of petitioner's appendix.

charges. The prosecutor recommended acceptance of the guilty plea (A 28) and during the ensuing colloquy, petitioner acknowledged, *inter alia*, his awareness of the facts that his dentistry license could be revoked as a result of his conviction and that "there has been no promise made to you by your attorney or indication as to what would happen with respect to * * * sentence * * *"(A 30). The court accepted the plea of guilty and scheduled sentencing for November 27, 1972 (A 31). At the request of defense counsel, sentencing was rescheduled for December 11th (A 16).

On December 11th, without any prior notice to the prosecutor, petitioner made a motion for a pre-sentence conference which was conducted on December 27th (A 16). At that time the prosecutor reiterated the People's position to defense counsel that a sentence of imprisonment would be requested. The People also opposed any lengthy adjournment of the sentencing date which was then scheduled for January 16, 1973 (A 16, 20-1).

Without notice to the People and at petitioner's request, sentencing was again rescheduled to February 28th, a date which the court specified as the "final" adjournment (A 16). On that date, petitioner discharged his then counsel and through his current counsel, without any prior notice to the prosecutor, filed a motion to withdraw Goldman's plea of guilty (A 17). Yet another adjournment was thus necessitated to permit the prosecutor to respond to the application. Prior to the conclusion of this proceeding, however, the trial judge noted for the record that petitioner's prior counsel had

> "Done a tremendous job on behalf of [his] client Mr. Goldman. The reasons why Mr. Goldman may have wished to substitute or change counsel at this time are beyond me" (A 17).

In his plea-withdrawal application, "petitioner's primary [legal] argument • • • was that he was induced to change his plea to guilty by representations of his then counsel that no term of imprisonment would be sought or imposed" (petition, pp. 5, 8). In support of this conclusion, petitioner alleged factually that:

1. "deponent was advised by his then attorney • • • that because of the 124 counts in the indictment, he was facing many years in jail"

and:

2. "The fact that counsel was able to obtain an acceptance of a plea of guilty to one count thereof, indicated that deponent had *little to worry* about being sentenced to jail on the day of sentence. Furthermore, that if deponent made restitution, he would assure himself the full *possibility* of not being sentenced to a jail sentence" (A 4) (emphasis added).

In opposition to petitioner's motion, the prosecutor submitted an affidavit containing, as an exhibit, a letter from Goldman's former attorney who stated in relevant part that prior to petitioner's plea of guilty:

> "• • • he was fully advised of the ramification of pleading and was similarly advised that no commitments or promises could be made with regard to punishment or the amount of restitution required.

> "The defendant * * * after being fully advised and stating repeatedly that he did not wish to go to trial, requested that he be allowed to plead guilty * * *
>
> "The matter of restitution was fully discussed with the defendant and he was advised that in our opinion, appropriate restitution would act in mitigation of punishment" (A 33-4).

Specifically responding to the prosecutor's affidavit and exhibit (A 35-8), petitioner submitted a reply affidavit. This time, Goldman alleged:

> "4. Prior to the entry of that [guilty] plea, I was told by Mr. Ringel that it was *unlikely* that a jail sentence would be imposed, that I would have 'little to worry about on the date of sentencing,' and that I would be 'assured' by making restitution" (A 39). (emphasis added)

The court denied Goldman's application without a hearing, concluding that "the defendant's allegations are certainly without merit and without basis" [Certified minutes of sentence, pp. 27-30, submitted by petitioner (petition, p. 5)]. Petitioner was thereafter sentenced to an indeterminate, four-year term of imprisonment.

On March 9, 1973, the Appellate Division, First Judicial Department, unanimously affirmed petitioner's judgment of conviction without opinion (42 A.D.2d 1052). On February 21, 1974, the New York Court of Appeals also unanimously affirmed that judgment without opinion (34 N.Y.2d 539).

ARGUMENT

Petitioner's meritless claims were properly rejected by the New York State Court of Appeals and do not raise susbtantial questions worthy of review by this Court.

Petitioner's counsel argues, as he did below in the state appellate courts, that Goldman should have been afforded an evidentiary hearing on his application to withdraw his guilty plea since petitioner had alleged "that he was induced to change his plea to guilty by representations of his then counsel that no term of imprisonment would be sought or imposed" (petition, p. 5). This argument is frivolous. Goldman never claimed that his counsel had told him that he would avoid a jail sentence by pleading guilty.

In his original, counseled affidavit filed in the trial court in support of his motion to withdraw his plea of guilty, petitioner alleged only that his former attorney had represented that Goldman had "little to worry about being sentenced to jail" and that by making restitution he would "assure himself the full possibility of not being sentenced to a jail sentence" (A 4). Moreover, in Goldman's second, counseled affidavit, submitted in response to the prosecutor and former counsel's answering papers which pointed out that defendant had been advised that no sentence promises had been made and that restitution would only mitigate his sentence (A 20-1, 33-4), petitioner simply reasserted that he had been told by counsel that a jail sentence was "unlikely" and that he would be "assured" by making restitution

(A 39). Manifestly none of these alleged facts support counsel's appellate claim that petitioner was induced to plead guilty by an assurance "that he would not go to jail" (petition, p. 8). And the New York State Court of Appeals, discerning the hollowness of Goldman's claim, properly affirmed his conviction.

Equally without merit is petitioner's secondary argument to this Court that certiorari should be granted and his guilty plea vacated because the trial court failed to inform Goldman in the guilty plea colloquy "of the consequences of his [guilty] plea" (petition, p. 11). That omission, even if it might, in the abstract, be deemed to constitute error, is irrelevant in the instant case. For it is undisputed that Goldman "was fully advised of the ramification of pleading guilty" by his former counsel (A 33) with whom Goldman conceded having specifically discussed possible jail sentences in terms of "years" (A 4). Under these circumstances, the asserted issue is merely hypothetical and, as such, should not be considered by this Court. *Socialist Labor Party* v. *Gilligan,* 406 U.S. 583, 586-7 (1972); *Flast* v. *Cohen,* 392 U.S. 83, 100 (1968); *Stearns* v. *Woods,* 236 U.S. 75, 78 (1915).

Conclusion

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD H. KUH
District Attorney
New York County

LEWIS R. FRIEDMAN
JONATHAN LOVETT
Assistant District Attorneys
Of Counsel

June, 1974